No. 12312

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARRY G. HASKETT,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### Jurisdictional Statement.

(A) On May 11, 1949, appellant filed in the District Court of the United States for the Southern District of California, Central Division, a "Motion to Vacate Judgment." Said court had jurisdiction to hear this motion as it was filed pursuant to the provisions of Section 2255 of the new Title 28, U. S. C.

(B) This court has jurisdiction of the appeal from the decision of the District Court denying the "Motion to Vacate Judgment" under the provisions of said Section 2255 of the new Title 28, U. S. C.

## Statement of the Case.

The appellant was prosecuted for a violation of the Mann Act (Title 18, U. S. C., Section 400) in the United States District Court for the Southern District of California, Central Division, and after a plea of not guilty to the charge was convicted by a jury and sentenced by the court on October 8, 1943, to 10 years in a Federal penitentiary. Thereafter, appellant filed an appeal from the judgment and commitment of the District Court and on November 15, 1944, the said judgment was affirmed by this court. See: *Haskett v. United States,* 145 F. 2d 465, C. C. A. 9th. On May 11, 1949, appellant filed *nunc pro tunc* as of May 2, 1948, in the above mentioned District Court, a motion to vacate judgment under Section 2255 of new Title 28, U. S. C. [T. 4-15], which was denied by the court on June 20, 1949 [T. 17]. Thereafter, on July 2, 1949, two documents each entitled "Notice of Appeal" were filed by the appellant [T. 21-26].

## Statute.

"28 U. S. C., §2255 (New). Federal custody; remedies on motion attacking sentence. A prisoner in custody under sentence of a court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution, of laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which im-

posed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

## Statement of Facts.

The facts of the commission of the crime for which the defendant was convicted are of no importance in this appeal from the order of the District Court denying the appellant's motion to vacate judgment since the only purpose of a motion to vacate judgment is to determine whether or not the judgment of conviction is void on the face of the record. See cases hereinafter cited.

## Questions Involved.

(1) Whether or not diligence must be used in filing a motion to vacate judgment?

(2) Whether or not a motion to vacate judgment may be used to review proceedings of trial as upon appeal?

## ARGUMENT.

### Diligence Must Be Used in Filing a Motion to Vacate Judgment.

Appellant has resorted to a motion to vacate judgment nearly six years after the date of his conviction in the District Court and almost five years from the date of the denial of his appeal from said conviction. It is submitted that the lapse of this period of six years from the date of his conviction, or even of the five years from the date his appeal was denied, is a sufficient bar to the vacation of appellant's judgment and conviction on his motion under Section 2255.

This is true although Section 2255 states in part: "A motion for such relief may be made at any time."

On page 1908 of the new Title 28 under "Revisor's Notes" there is the following notation:

> "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress."

In *United States v. Moore,* 166 F. 2d 102, C. C. A. 7th (Feb. 27, 1948), cert. denied 334 U. S. 849, the court stated at page 105:

> "[5] Furthermore, we agree with the District Court that the petitioner has too long slept upon his rights. In the absence of an applicable statute expressly providing limitation, apparently there is no limitation of time within which a writ of error *coram*

*nobis* lies or within which a motion to vacate may be filed, except that *an applicant must show reasonable diligence in presenting his claim.* In People v. Lumbley, 8 Cal. 2d 752, 68 P. 2d 354, a delay of six years and eight months after conviction was held unreasonable; in People v. Vernon, 9 Cal. App. 2d 138, 49 P. 2d 326, a delay of four and a half years; in U. S. v. Wright, D. C., 56 F. Supp. 489, a delay of fourteen years. See also U. S. v. Hunter, 7 Cir., 162 F. 2d 644.

"[6] The reasons which support the rule requiring diligence seem obvious. The Government must assert its cause of action against the defendant within a limited time; and after judgment, especially upon a plea of guilty, it may naturally assume that the transaction is closed and rely upon finality of the judgment. Consequently, there is no reason for longer preserving evidence and maintaining contact with witnesses. Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time. Of course, these considerations should not work to the disadvantage of one who acts promptly, but if, after knowledge of the facts relied upon, he willfully delays the assertion of his rights to the disadvantage of the Government, the result may often be not the granting a new trial to a defendant but the practical denial of any support for the Government to prosecute its action. *All limitations upon the assertion of rights and the granting of remedies are based upon sound public policy,* reasons for which need no further elaboration but apply to and are the basis for the requirements of diligence. See cases above cited."

The court further remarked:

> "We take it that there can be no question but that when it is sought to set aside and vacate a judgment, whether by complaint in equity or by way of *coram nobis* or its modern equivalent, a motion to vacate, such as we have before us, *no relief can be granted unless it appears that a retrial will result in a judgment different from the one sought to be vacated* and that, in the absence of such a showing, the judgment will not be set aside. The reason for this rule is that if defendant has no valid defense, so that a second trial must result in an identical judgment, then no actual injury has occurred and it would be a vain and idle thing to set aside the judgment already entered. As a corallary, it is not sufficient to aver merely, in general terms, that defendant has a good and meritorious defense but the nature of that defense, the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient." (Italics supplied.)

In *U. S. v. Rockower,* 171 F. 2d 423, C. C. A. 2d (Dec. 27, 1948), a motion to vacate judgment was made on the ground the judgment was void because it was entered in disregard of the defendant's constitutional rights. It is not clear if this motion was made expressly under Section 2255. However, the court at page 425 mentioned Section 2255 and the Revisor's note on that section, but stated that it was not clear whether the remedy of a proceeding by motion in the nature of a writ of error *coram nobis* was available to Rockower since the conviction and sentence were long since executed. Even so, the court held it was not necessary to decide this question since the case of *U. S.*

*v. Moore, supra,* 166 F. 2d 102, pointed to the approximate decision. The court went on to say:

> "The court, assuming the propriety of the remedy sought, denied it on three grounds: (1) that it must appear that a retrial would result in a different judgment from the one vacated and as a corallary there must be a showing of facts of valid defense or of a possibility of proving innocence or the like; (2) that the petitioner had too long slept upon his rights; and (3) that under Gayes v. New York, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1962, the defendant at the time of his subsequent sentence as a habitual offender had full opportunity to contest infirmities in the earlier sentences. All these grounds are directly pertinent here."

Of interest to this court will be several California state court decisions dealing with the nature and origin of this motion to vacate judgment and the period of time in which it must be filed.

In *People v. Vernon,* 9 Cal. App. (2d) 138, 49 P. 2d 326 (Sept. 12, 1935), an appeal was taken to the District Court of Appeal, Second Appellate District, from an order of the Superior Court of Los Angeles County denying an application for a writ of error *coram nobis.* The court stated as follows:

> "It is apparent that the remedy which the applicant sought in the lower court was inclusive of, but withal comparatively but a very small part of a remedial relief which, in the early stage of the development of common-law procedure, was obtainable by means of a 'writ of error, *coram nobis*';—the use of which was

recognized and permitted solely because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment."

* * * * * * * *

"—from all of which it is manifest that that which remains of the relief which ordinarily was available as part of the original common-law remedy of 'writ of error, *coram nobis*' is made equally available, not necessarily, as formerly, by the issuance of the *writ,* but simply by the legal machinery attendant upon a motion to vacate the judgment. It therefore results that, although the relief sought be of the nature of that included within and formerly afforded by a writ of error, *coram nobis,*—because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment. The practical result of such practice in effect and substance demonstrates that the relief that may be administered by the one form of procedure is identical with that in the other."

* * * * * * * *

"But, although the facts alleged to exist in the instant matter would appear to be such as should squarely invoke the application of the principle thus announced, it is suggested that in consideration of the existence of unquestioned additional facts, the relief for which the defendant has prayed should be withheld. In brief, such facts are, firstly, that at all times since his plea of 'guilty' was entered, with full personal knowledge on the part of defendant of the al-

leged facts and circumstances surrounding the making by him of such plea, without reasonable or any excuse offered or suggested in that behalf or connection, he has delayed and waited an unconscionable and unreasonable length of time, to wit, the space of more than four and one-half years without taking, or attempting in any manner to take, appropriate action in the premises, as far as such alleged facts were concerned;

* * * * * * * *

"As a matter of legal principle, the rule has been frequently announced that, in order that it may be effective and within the possibility of favorable action thereon, a motion to vacate a judgment must be made 'within a reasonable time' after such judgment has been rendered; and in this state the concrete examples of what should be construed as 'a reasonable time' would seem to point to the conclusion that in the instant matter the delay has been so long that the prayer of the petitioner should not be granted. (18 Cal. Jur. 651, and authorities there cited.)"

In the recent case of *The People, Respondent, v. Louis Martinez, Appellant,* 88 A. C. A. 793, 88 Cal. App. 2d 767, 199 P. 2d 375 (Nov. 23, 1948), the defendant was sentenced to life imprisonment on June 18, 1940, and no appeal was taken. Nearly eight years later defendant moved to vacate the judgment of conviction. The motion was supported by affidavits but was denied by the trial court. This case cited is an appeal from the order of denial. The court stated:

"Although this proceeding was denominated below as a motion to vacate, it is properly a petition for a writ of error *coram nobis.*

* * * * * * * *

*"The writ of error coram nobis never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal.* It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment.

* * * * * * * *

"Appellant offers no reasonable explanation as to why he delayed nearly eight years in making this application. An application for a writ of error *coram nobis* should be made within a reasonable time. *Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands.* (Italics supplied.)

* * * * * * * *

"In the instant case the unexplained eight-year delay would appear to be fatal to the request to grant the sought for relief.

"The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum.* In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available."

In *People, Appellant, v. John Lumbley, Respondent,* 8 Cal. 2d 752 (May 25, 1937), an appeal was taken from an order granting a writ of error *coram nobis.* In reversing the decision of the trial court, the court stated:

> " 'It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis,* but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ *coram nobis. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime.* Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.' "

The court further quoted *People v. Vernon, supra,* 9 Cal. App. 2d 138, and said at page 761:

> "The untimely delay on the part of defendant in petitioning for the writ would have been sufficient grounds for denying it." (Italics supplied.)

See also:

*People v. Gilbert,* 25 Cal. 2d 422 at 442 (Dec. 22, 1944);

*Cuckovich v. United States,* 170 F. 2d 89, C. C. A. 6th (Oct. 22, 1948).

As stated above, according to the Revisors Notes, Section 2255, "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis.*" Accordingly, no limitation was placed in said section on the time in which the motion must be filed, since before the enactment of Section 2255 there was no limitation of time within which to apply for a writ of error *coram nobis* (in the absence of an express statutory limitation). The one exception to this last statement as set forth in the cases was that the *applicant had to show reasonable diligence* in presenting his claim. The logical practical reasons behind this qualification of the rule are clearly set forth in *U. S. v. Moore, supra,* 166 F. 2d 102 at 105. Certiorari was denied in this case on June 14, 1948, a few months before the effective date of new Title 28; however, since Section 2255 is a restatement of the procedure in the nature of the writ of error *coram nobis,* the *Moore* decision is applicable also to proceedings under this code section.

In *U. S. v. Landicho,* 72 Fed. Supp. 425 (Aug. 11, 1947), the defendant entered a plea of guilty to a charge of murder in the second degree on or about November, 1941, and received a sentence of 20 years imprisonment. In November, 1946, more than 5 years after judgment was pronounced against him defendant filed a motion *coram nobis* to vacate judgment and for a new trial on the ground that at the time of the killing and during judg-

ment and sentence, the defendant was not of sound mind. At page 426, the court remarked:

> "It is equally understandable that after lapse of many years, when witnesses against him may no longer be available and when at least one witness, apparently an important one, has been removed by death, the defendant should eagerly explore any and every avenue by which his freedom may now be attained."

After stating that the "defendant's motion, therefore, is in one aspect a motion for a new trial," the court further said that:

> "In some features the defendant's allegations as stated in his motion may be based upon the assumption of the complete gullibility of those having power to act."

In denying the defendant's motion, the court concluded at page 429:

> "Accordingly, I conclude that in formulating the Rules and particularly in rejecting the recommendation of the Advisory Committee for new trial on ground of denial of a constitutional right without limit as to time, the Supreme Court has provided in effect that the failure of the trial court—even failure from lack of factual knowledge—to accord to one accused of crime whatever is legitimately embraced in due process may be remedied through *habeas corpus* in all cases where relief by new trial or by appeal is not available. The enlargement of the common law scope of *habeas corpus* by Congress 28 U. S. C. A., §451 *et seq.*, and by definition as illustrated in Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357, supports this view.

* * * Even before adoption of the Rules, a motion *coram nobis* sterile in result did not bar *habeas corpus,* Waley v. Johnston *supra,* 316 U. S. at page 105, 62 S. Ct. 966, 86 L. Ed. 1302, reinforcing the conclusion that by Rule 33, as adopted, the Supreme Court considered *habeas corpus* alone to afford a channel, indeed, *the* channel, for obtaining relief in all such circumstances as are here presented."

Although this case was decided before the effective date of new Title 28, it is still persuasive authority in the case involved herein.

**A Motion to Vacate Judgment May Not Be Used to Review Proceedings of Trial as Upon Appeal.**

It is evident from the cases cited herein that a motion to vacate judgment can be used only for very limited purposes. The most recent federal decision on this point is *Birtch v. U. S.,* 173 F. 2d 316, C. C. A. 4th (March 9, 1949). The court stated at page 317:

"The present appeals are from orders denying motions made under 28 U. S. C. A. §2255; but we think that they are entirely without merit. It is true of motions made under this section, as we held of motions in the nature of applications for writs of error *coram nobis* under the prior practice in the appeal before us, that they 'may not be used to review the proceedings of the trial as upon appeal or writ of error, but merely to test their validity when judged upon the face of the record or by constitutional standards.' See also *Howell v. United States,* 4 Cir., 1949, 172 F. 2d 213.

"Relief under 28 U. S. C. A. §2255 may be granted only where it appears 'that the judgment was rendered without jurisdiction, or that the sentence im-

posed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.' *It should be borne in mind that the purpose of the section was not to enlarge the class of attacks which may be made upon a judgment of conviction,* * * *" (Italics supplied.)

See also:

*Birtch v. U. S.,* 164 F. 2d 880, C. C. A. 4th (Dec. 5, 1947), cert. den. 331 U. S. 825, 333 U. S. 848, 333 U. S. 870.

In the late case of *Howell v. U. S., supra,* 172 F. 2d 213, C. C. A. 4th (Jan. 24, 1949), at page 215, the court gave further support to this proposition and said:

"It is elementary that neither *habeas corpus* nor motion in the nature of application for writ of error *coram nobis* can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. *It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U. S. C. A. 2255.*" (Italics supplied.)

In *Lucas v. U. S.,* 158 F. 2d 865, C. C. A. 4th (Dec. 6, 1946), at page 866, it was stated:

"It (motion to vacate judgment) raises no question, however, except whether the judgment and sentence are void on the face of the record, and cannot

be used to review the proceedings of the trial as upon appeal or writ of error. *Ong v. United States,* 4 Cir., 131 F. 2d 175."

See also:

*Mancuso v. U. S.,* 162 F. 2d 772, C. C. A. 6th (June 30, 1947), at page 773;

*Barber v. U. S.,* 142 F. 2d 805, C. C. A. 4th (Feb. 5, 1944), at 807-808;

*Pifer v. U. S.,* 158 F. 2d 867, C. C. A. 4th (Dec. 6, 1946), writ den. Feb. 3, 1947, 67 S. C. 636;

*U. S. v. Wright,* 56 Fed. Supp. 489 (Sept. 6, 1944), cert. den. 330 U. S. 841, 331 U. S. 863;

*Stidham v. U. S.,* 170 F. 2d 294, C. C. A. 8th (Nov. 2, 1948).

It is clear that appellant is here attempting to obtain another review of matters of fact already decided against him on appeal in this court. *Haskett v. U. S., supra,* 145 F. 2d 465. Also, through his motion to vacate judgment, he was in effect asking the trial court to exercise the functions of the court of appeals by requesting it to review the proceedings of the trial as upon appeal. If such a practice were tolerated those convicted would be able to "litigate and relitigate the propriety of their convictions *ad infinitum.*" *People v. Louis Martinez, supra,* 88 A. C. A. 793, 88 Cal. App. 2d 767, 199 P. 2d 375.

It must be remembered that in the earlier stages of the development of the writ of error, *coram nobis,* the right to move for a new trial and the right of appeal from the judgment did not exist. Since the latter two remedies are now available, the writ of error, *coram nobis,* or its modern equivalent, the motion to vacate judgment, conse-

quently serves a modified and limited purpose. Further, the court in *Birtch v. U. S., supra,* 173 F. 2d 316, observed that:

> "It should be borne in mind that the purpose of the section (2255) was not to enlarge the class of attacks which may be made upon a judgment of conviction. * * *"

The question therefore is whether there has been the denial of the substance of a fair trial. *Howell v. U. S., supra,* 172 F. 2d 213. Of course, it is the Government's position that this question need not be decided herein since the appellant did not use diligence in filing his motion under Section 2255 and therefore is barred from any relief thereunder. But, even so, assuming for the sake of argument only that the motion was timely made, it is clear that all of the "errors" designated by appellant are without merit and fall within the category of matters which cannot be reviewed by the trial court on a motion to vacate judgment. However, a few remarks will be made about several of these objections in passing.

Appellant questions the fact that the trial court erred in admitting testimony of his wife, Alma. This most certainly was a matter to be raised on appeal and not an error, if it were such, that would make the judgment void on the face of the record. See: *Goalette v. Hunter,* 73 Fed. Supp. 717 at pages 719, 720. Even so, the trial court did not err in admitting the testimony of appellant's wife. In *Hayes v. U. S.,* 168 F. (2d) 996, C. C. A. 10th (1948), the appeal was from an order denying a motion to vacate judgment and sentence. The appellant had been indicted on a charge of transporting his wife in interstate commerce with the intent of having her engage in

prostitution. A plea of guilty was entered to each of four counts and the appellant was sentenced to a term of imprisonment on October 22, 1946. The Court of Appeals affirmed the order of the District Court denying the appellant's motion to vacate judgment and stated at page 997:

> "And, at common law, where the crime charged against the husband is a *personal wrong against the wife,* she is a competent witness against her husband. An act against the wife harmful to her morals is within the rule."

The rule that one spouse cannot be compelled to testify against the other is rigorously attacked by Wigmore, who states that the privilege has persisted on the "strength of certain artificial dogmas,—pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the specter of forensic doubt." (VIII Wigmore, *op. cit.,* Sec. 2228, p. 224.)

Further, as this Court said, in *Cohen v. United States,* 214 Fed. 23, 29, C. C. A. 9 (1914):

> "At common law the husband and wife were each under total disability to testify for the other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission. Wigmore on Evidence, §2242; Benson v. Morgan, 50 Mich. 77, 14 N. W. 705. But the common law made an exception to the rule of privilege in cases where the husband or wife was

called as a witness to testify as to personal wrong or injury sustained from the other. Wigmore, §2239.

"We are of the opinion that the personal injury to a wife which permits the admission of her testimony against her husband, within the exception recognized at the common law, and expressed in the Oregon statute, is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a *serious moral wrong inflicted upon her,* * * *" (Italics supplied.)

Here the victim was the wife's own thirteen-year-old daughter and the defendant's step-daughter. Surely, the conduct of the defendant toward this child was a "serious moral wrong" inflicted upon her natural mother as well as upon herself.

The cases of *People v. Lumbley, supra,* 8 Cal. 2d 752, and *United States v. Landicho, supra,* 72 F. 2d 425, demonstrate that the defense of insanity is not a matter to be presented on a motion to vacate judgment but again is a point that should have been raised on the appeal from the judgment and commitment. No affidavits or other supporting documents were filed with the appellant's motion to establish this plea. Appellant was represented by competent counsel at the time of trial and apparently he saw no merit in raising the matter at that time or on appeal.

Appellant complains in his designation of "errors," of the representation he received by counsel during the trial and at the hearing before the District Court on his motion to vacate judgment. However, the court in *Ong v. U. S., supra,* 131 F. 2d 275 (Nov. 6, 1942), dealt with this point and stated on page 176:

"The brief filed by appellant makes complaint of the conduct of counsel who represented him on the

> trial and of the charge of the court; but these are matters which cannot be considered on a motion to vacate a judgment on the ground that it is void. A defendant cannot wait until his time for appeal has expired and then review the proceedings of the trial on a motion to vacate the judgment as upon appeal or writ of error. Such a motion can prevail only where the judgment is void on the face of the record, *i. e.,* only where its invalidity appears upon the face of the court records themselves."

Appellant further complains of the sentence he received as a result of his conviction. The *Ong* case also disposes of this contention as follows:

> "The appellant complains of the severity of the sentence imposed upon him and calls attention to a recommendation of clemency made by the jurors who tried him. This, however, is a matter for the Parole Board or the Pardon Attorney and not for us, as the sentences imposed are within the statutory limit."

It should be noted that in his brief on appeal, the appellant has included material which is not in the record before this court. See *Morris v. District of Columbia,* 124 F. 2d 284 (1941), which holds that extra-record evidence referred to in the briefs will not be considered on appeal.

Another point raised by appellant is that he was not "allowed a change of venue or his desired witnesses." However, there is no question that jurisdiction did exist in this case: and a change of venue is largely in the discretion of the trial court. See *Rakes v. U. S.,* 169 F. 2d 739, C. C. A. 4th (July 2, 1940), writ denied October 11, 1948. Further, in *Gates v. U. S.,* 122 F. 2d 571, C. C. A. 10th (Aug. 27, 1941), rehearing denied Oct. 10, 1941, the court held

that a change of venue for the convenience of a person charged with a crime and a change of venue for a trial at the place of residence of a majority of the witnesses is within the discretion of the court and the exercise of such discretion is not reviewable. Also see *U. S. v. Zeuli,* 137 F. 2d 845, C. C. A. 2d (Aug. 2, 1943), wherein the court quoted with approval *Hagner v. U. S.,* 54 F. 2d 446, and *Mahaffey v. Hudspeth,* 128 F. 2d 940, which held that an objection to the venue of a prosecution may be waived, and will be, by going to trial upon the merits.

## Conclusion.

It is respectfully submitted:

(1) That the diligence required by the cases herein cited was not exercised by the appellant in filing his motion to vacate judgment in the District Court. Therefore, he is barred from relief under Section 2255 of the new Title 28.

(2) That a motion to vacate judgment may not be used to review proceedings of the trial as upon appeal and in this case appellant has cited no instance where he has been deprived of the substance of a fair trial.

(3) That even so, there is no merit to any of the "errors" designated by the appellant.

James M. Carter,
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